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WALTER G. SMITH - - EDITOR.
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SUPREME COURT'S OPINION.

The Supreme Court yesterday filed a decision in the case of Walter G. Smith, editor of The Advertiser, who was sentenced to thirty days' imprisonment by the Circuit Court for contempt of court, in publishing a cartoon of Judge Gear. The case had been brought before the Supreme Court on habeas corpus proceedings, the main point being that the act committed was not in the presence of the court, so that if contempt had been committed at all, it was "constructive contempt," which by Hawaiian statute is not punishable, and consequently that the Circuit Court had no jurisdiction to sentence Mr. Smith.

The decision of a majority of the court, by Judges Frear and Galbraith, upholds the decision of the Circuit Court, while Judge Perry files a strong dissenting opinion.

Each of the Judges has written an opinion of his own. The decision of Judge Galbraith is that the contempt committed was a direct contempt. The decision of Judge Frear is somewhat obscure in its reasoning and meaning. As far as a brief study thereof indicates, he holds that under Hawaiian statute the Supreme Court cannot on habeas corpus proceedings, which are of a collateral nature, inquire into the merits of the case. He states, in effect, that if these proceedings had come before the Supreme Court on appeal or writ of error, as is allowed by the statutes of some of the states, but is not allowed under Hawaiian law, the result might have been different. As it is, he feels bound by the technicalities of the situation, and declines to go into the merits of the question, holding that the Circuit Court had jurisdiction.

Judge Perry holds, in a strongly reasoned and logical decision, that the publishing of the cartoon was not a direct contempt, and is, if anything, a "constructive contempt," which by Hawaiian statute is not punishable.

The difference between a "direct" and "constructive" contempt is that a direct contempt is one committed in the presence or immediate vicinity of the court. A constructive contempt is an act not committed in the presence of the court, such, for example, as newspaper articles commenting upon, or cartoons relating to the court.

The reasoning in Judge Galbraith's decision is, as we understand it, that any newspaper commenting upon the decision of a court in a manner distasteful to the Judge of that court, is liable to be punished for contempt, notwithstanding that there is an existing statute prohibiting the punishment of constructive contempt.

The decision of Judge Perry is a direct negative of the reasoning of Judge Galbraith and denies that the courts have any such power.

The decision of Judge Frear, while it in effect supports that of Judge Galbraith, does not go as far, and whether it supports to the full the theories advanced by Judge Galbraith are left an open question.

The attorneys for Mr. Smith, Messrs. W. O. Smith and A. Lewis, Jr., and Lorrin Andrews, believe that a Federal question is involved, in that Congress, having ratified, among other statutes, the Hawaiian statute prohibiting the punishment of "constructive contempt," that statute is now as much a Federal statute as though it had been passed by Congress in the first instance. If this contention is correct it gives jurisdiction to the Federal courts to consider whether or not the act committed is, in effect, a direct or a constructive contempt. With a view to securing Federal adjudication on this point, the question will be immediately brought before United States District Judge Estee, on a writ of habeas corpus.

SUPREME COURT DECIDES AGAINST WALTER G. SMITH

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tumelious, disrespectful cartoon or picture, a copy of which is hereto attached and made a part hereof, intending and meaning thereby to throw disrespect upon the Honorable George D. Gear, one of the Judges of said court, and the presiding Judge at both of the trials hereinbefore named; and in said cartoon or picture intending to and attempting to represent the former action in a ludicrous and disgraceful manner of him, the said Honorable George D. Gear, in his official and judicial capacity, as well as to prejudice the case of said defendant in the minds of the public and jury trying said cause and that by reason of said insulting, contemptuous, contumelious and disrespectful picture or cartoon, and intending to publish animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice; and by knowingly publishing an unfair report of the proceedings of the court, and malicious invectives against the court and jury tending to bring such court and jury, and the administration of justice into ridicule, contempt, discredit and odium, did then and there and thereby commit a contempt of court." An order was thereupon issued citing Smith to appear at a time stated and show cause why he should not be adjudged guilty of contempt "in publishing, printing and circulating the said statement of and concerning the Presiding Judge of this court and the cartoon or picture with reference to a cause now pending and undetermined in this court, to-wit: the case of the Territory of Hawaii against William McCarthy, and which said statement and publication and picture or cartoon is well calculated to prejudice the minds of the jury sworn to try the issues and hinder, obstruct and prevent the court and jury in the discharge of their duties and the administration of public justice." The respondent appeared and filed a return and after certain other proceedings had been had, judgment was rendered and sentence pronounced.

In the view which I take of the case, it becomes material to consider whether the respondent in that proceeding was committed and sentenced for a constructive contempt or for a direct contempt.

As to the distinction between these two classes of contempts. "A direct contempt, or a contempt in facie curiae, is noisy or tumultuous conduct in the presence of the court, or so near thereto as to interrupt its proceedings; or an open defiance of its powers or authority; or disrespectful behavior or language to the presiding Judge; or any improper conduct tending to defeat or impair the administration of justice. An indirect or constructive contempt is one offered elsewhere than in the presence of the court, and which tends by its operation to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the due administration of justice."—7 Am. & Eng. Encycl. Law, 2nd Ed. 28. "Contempts are defined to be, direct, such as are offered in the presence of the court, while sitting judicially or constructive, such, though not in its presence, as tend to obstruct and embarrass or prevent the due administration of justice."—State v. Wilson, 64 Ill. 195. "The contempt is direct when committed before and in the presence of or so near to the court as to interrupt the proceedings of the court. . . . Contempts are constructive when they are committed not in the presence of the court, and when they tend by their operation to interrupt, obstruct, embarrass or prevent the due administration of justice."—Whittem v. State, 36 Ind. 196, 212, 213. "Contempts are generally divided by jurists into the classes of direct and constructive; direct being those committed in the presence of the court, and constructive being those acts which the court would have to construe by some process of reasoning to be equivalent to a direct contempt."—In re Bush, 8 Haw. 222. See also Church on Habeas Corpus, Sec. 306; Bradley v. State, 50 L. R. A. 692 (111 Ga. 168); Cooper v. People, 22 Pac. (Colo.) 795; State v. Kaiser, 20 Or. 57.

Assuming that the cartoon and words complained of are of the nature charged in the affidavit, i. e., insulting, contemptuous, contumelious, disrespectful and tending to obstruct and prevent the administration of justice, and that, as contended on behalf of the present respondent, they were of and concerning the case then pending and undetermined and not, as contended on behalf of the petitioner, of and concerning the case first tried and then concluded, and that the Circuit Court so found, and that such finding cannot be reviewed on habeas corpus, still, if the objectionable matter was published and circulated or caused to be published and circulated by Smith, or even, perhaps, by the proprietors of The Advertiser, only in the city generally and not in the court room or in adjoining portions of the court house, these acts would at most constitute a constructive contempt only. If, on the other hand, Smith or, let us say, the proprietors, published and circulated such matter, or caused it to be published and circulated, within the court room or in the adjoining portions of the court house, the contempt would be direct. Although there may be, perhaps, a few authorities to the contrary, this is supported by the great weight of authority. In Cooper v. People, supra, immediately after the language above quoted, the court said: "The acts here complained of belong to the latter class (constructive) if either. They consist of the publication in a newspaper, of general circulation in the place where the court was being held, of such articles in reference to a case pending as were calculated to interfere with the due administration of justice, as it is said." "We have in this case, not a case of direct contempt, but a case of indirect or constructive contempt, alleged to have been committed by the publication of these several articles in a daily newspaper, which are alleged . . . were intended to and did prejudice the people against the court and grand jury, embarrass the administration of justice and reflect upon the court and its proceedings."—Fishback v. State, 131 Ind. 304, 312. "A newspaper corporation which deliberately seeks to influence judicial action by the publication of articles threatening the judges with public odium and reprobation in case they decide a pending cause in a particular way, is guilty of constructive contempt."—State v. Bee Publishing Co., 59 L. R. A. (Neb.) 195.

Ackermann vs. Congdon, 7 Haw., 31 (January, 1887), was a case of a publication in a newspaper of an article containing expressions which were deemed by the court to be "calculated to prejudice the tribunal which was to try defendant's case and render it unfavorable to him." The defendant's case referred to was pending. The publication was held to be a contempt, but that it was regarded as a constructive contempt is plain from the language of the court: "As the case before us is the first instance of constructive contempt of this character brought to our notice, and as the case is not a serious one, we impose no fine." (p. 28.)

In Smith vs. Aholo, 7 Haw., 117 (April, 1887), the publication in a newspaper, was of an abstract of a bill in equity, and while the suit was pending. The court said: "We had occasion, at the January term, 1887, of this court, in the case of the Hawaiian Gazette, ante, page 31, to say that such publications as appear to have a prejudicial effect upon the rights of the parties in cases pending in the courts, were punishable as constructive contempts of court. * * * The publication in question comes within the principle laid down in the Gazette case, and is fully sustained by authority." See also, on this subject, State vs. Circuit Court, 72 N. W. (Wis.), 193, 195.

The case of Telegram Newspaper Co. vs. Commonwealth, 172 Mass., 294, cited for the respondent, does not hold to the contrary. It was immaterial in that case whether the contempt was direct or constructive, for the court was not limited by statute in the matter, but had power to punish either or both. The court merely held that the publication was a contempt, and while it said, page 298, "If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court," it also said, "The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then before the court."

The mere fact that the petitioner, at the time that he published or caused to be published and circulated, generally, the newspaper containing the matter in question, knew, if he did, or must have known, that some subscriber or subscribers, to whom the paper would be delivered in due course, might bring copies of the paper to the court room and there circulate or publish them, would not of itself, on any principle that I know of, render the petitioner criminally liable for such publication or circulation in the court room. (There is, it is true, authority to the contrary.) To convict him upon such facts would be to hold him liable for the acts of others not aided, incited or encouraged by him. Such a case would not come within the rule as to responsibility for the natural and plainly probable consequences of one's acts.

Bearing in mind these definitions and distinctions, of what offense does the mittimus show the petitioner to have been adjudged guilty and for what offense does it show that sentence was imposed upon him?

After reciting in full the motion for citation or affidavit the mittimus further recites that Smith was cited to answer "to the said charge of contempt which had been duly filed against him," and that upon due hearing of the evidence and of counsel "in support of the charge," and contra, "the said Circuit Court found the said Walter G. Smith guilty of a contempt of this court as charged in the affidavit and motion." The affidavit and motion, as appears from the quotation above made, charged a constructive contempt only; it charged that the petitioner "did make and publish for circulation" the matter referred to and, perhaps, that he knowingly published an unfair report of the proceedings and malicious invectives, etc. It did not, directly or indirectly, charge a publication or circulation by the petitioner or by any one else in the court room or in the court house. Thus far, then, the mittimus shows a conviction of a constructive contempt only.

The Cuddy case (131 U. S., 280) is distinguishable from that at bar. In the former the finding of the lower court was that the petitioner "did approach" a certain juror with a view to influencing him. The record in the habeas corpus proceedings was entirely silent as to the place where the juror was approached. The words used in the finding were consistent with the theory that the act was committed in the presence of the court as well as with the theory that it was not committed in the presence of the court. The Supreme Court held that under those circumstances the presumption was that the court found the juror was approached in the presence of the court and that therefore the sentence was valid. In the case at bar, on the other hand, the record shows affirmatively, as it seems to me, that the acts charged were committed elsewhere than in the court rooom or court house. The language of the affidavit adopted and made a part of the judgment and mittimus, is to be read in its ordinary acceptation. So read, it means, if it means anything, that the making and publishing was away from the court house. When one says that the "Advertiser" is "a newspaper printed, published and of general circulation within Honolulu," and that in its issue of a certain day the said newspaper and its editor and servants, "did make and publish for circulation" certain matter, he certainly does not mean that it was in the court room or court house that the editor and others did so make and publish for circulation. The language used seems to me to be incapable of such a construction.

The next and last recital of the mittimus in the case at bar is as follows: "And whereas the said Walter G. Smith was guilty of a contempt of this court by publishing and printing a certain false, scandalous, malicious and defamatory statement accompanied by a printed picture or cartoon, which said statement and cartoon had especial reference to the case of the Territory of Hawaii vs. William McCarthy and to the conduct and judicial acts of the judge presiding on the trial of said cause, which said false, scandalous, malicious and defamatory statement and printed picture or cartoon was circulated and published in the court room, in the court house in Honolulu during the trial of the cause of the Territory of Hawaii vs. William McCarthy, which said publication was calculated to prejudice and did prejudice the minds of the jury and prevent a fair and impartial trial of the issues involved in said case, and is calculated to obstruct and did obstruct the Circuit Court in the administration of justice and in its duties in the trial of said cause which was then and is now pending and undetermined." Of this it is to be observed that it is not a recital of a conviction or of an adjudication of guilt, but merely that Smith was guilty. The mittimus, however, is not the judgment or verdict; it is merely a formal order issued to the sheriff reciting that a certain judgment or verdict has been theretofore rendered and sentence passed and directing the execution of such sentence. It is not sufficient that the mittimus recite that the accused was guilty but it must show on its face that he has been adjudged guilty by a jury or by the court, as the case may be. In other words, even though an accused is guilty, a conviction or judgment to that effect by a competent tribunal is necessary to support a sentence or the execution thereof. Without such conviction or judgment, the sentence and order of execution would be invalid. "But it is clear that a general order to imprison a party unless he has been convicted either by a jury or by the court is a mere nullity. The law requires that before a sentence of imprisonment shall be passed against a party, he should first be convicted of an offense. In ordinary cases, this conviction must be by the verdict of a jury. In the case of contempts, it may be by the judgment of the court. Still, in either case, the record must show a conviction. Now it will be seen from this return that there is no judgment of imprisonment for a contempt generally, or for a contempt in refusing to answer questions. There is not any conviction or adjudication by the court that Mr. Adams had been guilty of a contempt. Without such judgment the court had no right to commit him to prison, nor the sheriff to detain him. It is true, and was admitted on the argument, that Mr. Adams did refuse to answer questions asked by the grand jury, and it may be true that the court considered that a contempt for which he deserved imprisonment, but no such judgment has been rendered in the case; and however many contempts the prisoner may have committed, it is not lawful to imprison him until convicted thereof by the judgment of the court, which judgment and conviction must appear by the record." Exparte Adams, 25 Miss., 892 (59 Am. Dec., 234, 242, 243). "So that it appears that there has been no adjudication that petitioner and his associates have been guilty of a contempt. If this be true, then the commitment, occupying as it does the place of an execution, has no basis on which to rest. For it is the judgment and not the mittimus by virtue of which the party committed is detained. People ex rel. vs. Baker, 89 N. Y., 460. Unless the record shows a judgment of conviction of contempt, a petitioner may avail himself of the remedy provided by habeas corpus." Ex parte O'Brien, 127 Mo., 477, 488, 489. See also Ex parte Van Sandau, 1 Phillips, 604, 606, 607; People vs. Bennett, 4 Paige, 282; In re Blair, 4 Wis., 521; Sherwood vs. Sherwood, 22 Conn., 1.

Assuming, however, that the language used can be held to be an averment of a conviction or judgment of guilty of

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